No. 645 & 646 Supreme Court, U. S.
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IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1896.

THE LOUISVILLE TRUST COMPANY,
Appellant,

vs. No. 645.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY.

THE LOUISVILLE BANKING COMPANY,
Appellant,

vs. No. 646.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY.

Reply to Appellants' Brief against Appellee's Motion to direct the Circuit Court to Vacate Order Dismissing Appellee's bills, etc.

GEO. W. KRETZINGER,
E. C. FIELD,
JAMES S. PIRTLE,
For Louisville, New Albany & Chicago Railway Company, Appellee.

Rogers & Sherman Print, Chicago.

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Reply to Appellants' Brief against Appellee's Motion to direct the Circuit Court to Vacate Order Dismissing Appellee's bills, etc.

It appears from the record that the bill was filed by appellee in the Circuit Court to have its alleged guaranty on the Beattyville bonds adjudged void.

On final hearing the Circuit Court by final decree so adjudged.

Appellant appealed to the Circuit Court of Appeals, on bond for costs.

That court reversed the decree, with costs, as to appel-

lants, and directed the Circuit Court to dismiss the bill as to them and some others.

Thus no money except for costs was decreed.

The order for the injunction upon appeller's bill recites:

"And orders an injunction to issue pursuant to the prayer of the bill, upon complainant filing bond conditioned according to law, in the penal sum of fifty thousand dollars, with security to be approved by the district judge or clerk of this court."

Transcript, p. 22.

Then follows an order approving the bond and sureties given and offered by appellee in the amount required.

Transcript, p. 22.

Counsel concede that if this court should reverse the judgment of the Circuit Court of Appeals the mandate of this court would vacate the order of dismissal and effectively restore appellee's bill

They contend, however, that the purpose of this motion is to keep alive and retain in full force the injunction heretofore granted by the trial court upon appellee's bill.

I.

In reply we submit:

1st: This court will presume that this injunction bond was ordered in a sufficient amount, to fully protect appellants and that it still remains in full force and effect. Counsel neither claim nor intimate the contrary.

The gist of counsel's insistence is that appellee should be required to give *another* injunction bond in this court.

The rule is well settled, however, that the Appellate Court will not review the exercise of the discretion of the Circuit Court in fixing the penalties or approving the sureties of such bonds.

Therefore it must be conclusively presumed that appellants are abundantly protected by this required and approved bond against any and all damage caused by the issuance of the injunction, if this court should finally affirm the judgment of the court of appeals.

Suppose counsel had moved this court to require appellee to give bond before the issuance of these writs. Would this court have so ordered, notwithstanding the court of appeals act does not require any bond in such cases?

Suppose the Circuit Court of Appeals had affirmed the final decree of the Circuit Court, and appellants had brought the record to this court for review on writ of *certiorari*, would they have been required to give further bond for costs or for damages to appellee?

Answers to these queries fully reveal the fallacy of counsel's contention.

Our contention is that we are entitled to this motion because:

(*a*) The application for the writ was promptly made.

(*b*) It was made by stipulation for record upon which should be had final hearing in case the writ should issue.

(*c*) Appellants have full statutory protection in the injunction bond required by the trial court.

(*d*) That under the Circuit Court of Appeals Act, appellee is entitled to the writ *certiorari* in a proper case (and this court has held appellee entitled thereto) without bond and upon its issue is entitled to a review of the record without further assignment of error, from which it conclusively follows that appellee is equally entitled to the full benefit of the reversal of the judgment of the Circuit Court of Appeals, if this court should reverse.

2. Counsel clearly misinterpret the scope of our motion. We simply move this court to direct the vacation of the order dismissing the bill and thereby to place the case in the condition of its record at the date of granting the application to this court for the writ.

3. We have not moved or asked this court to grant any order touching the injunction issued by the trial court.

II.

Judge BARR held in his opinion upon this motion (see opinion on motion, page 26), that "perhaps the better authorities are that the *certiorari* when awarded and notice thereof given was in itself a supersedeas. We think this is the effect of the *certiorari* granted under the act of 1891 by the Supreme Court."

Judge BARR then cites, quotes and approves *McWilliams* v. *King*, 32 N. J. L., 23, in which the court held:

"That everything done after such notice is not only irregular but absolutely void, and the parties doing such acts are trespassers."

Therefore we did not move this court to make this writ of *certiorari* a supersedeas, because as held in *McWilliams* v. *King*, *supra*, "the writ of *certiorari* is of itself and *proprio vigore* a supersedeas."

We moved the court to *undo* that which the Circuit Court did, after our record was in this court and our application for the writ was before it and only two days before it was issued.

This situation is in perfect analogy with that in *Bilderback* v. *Moore*, 17 N. J. L., (2 Har.), 510 and *Allen* v. *Shurtz*, 16 N. J. L., (1 Har.), 221.

In those cases execution was issued *after* the aplication for but *before* the *certorari* issued, and *on motion* the courts ordering the writs *stayed* the execution in the court below.

It follows therefore, that the Slaughterhouse cases (10 Wall., 273), and other cases cited by counsel, under point 1 of their brief, are not in point and do not in the least degree bear upon *this* motion.

III.

Counsels' construction of the stipulations would necessarily eliminate many of their recitals, to which they studiously avoid any reference whatever. They insist that our construction extends the stipulation to matters not covered by it. We quote one clause (Transcript, page 221):

"It is further agreed that the determination of the motion for *certiorari* in said two cases shall control in all the other cases not specially named, and if the Supreme Court of the United States shall cause the writ to issue the affirming or reversing by the Supreme Court of the United States of the judgment of the Circuit Court of Appeals in the Sixth Circuit in the said two specially named cases shall have the same effect as if all the said cases not specifically named had been removed by writ of *certiorari* to the Supreme Court of the United States and by said court affirmed or reversed. * * *

"It is further stipulated and agreed that the said motions in the Supreme Court of the United States and said cases, if the motions should be granted, shall be heard upon the record stipulated as above," etc.

Thus this is an express agreement to transfer the stipulated record to this court, to make it the record for the application for the writ and upon its issue to make it the record for the final consideration and judgment of this court thereon, and such judgment when rendered by this court was to be entered in the other cases not brought to this court by *certiorari*.

Did not the dismissal of this bill, even for the purpose contended by counsel, violate this stipulation and its clearly expressed purpose?

This stipulation was a submission of the stipulated record by counsel for appellant, not only for the determination of the application for the writ, but for final disposition if the writ should issue.

IV.

6. Counsel conclude by insisting that this court should require appellee to give another injunction bond.

We have shown that one satisfactory to the Circuit Court in penalty, condition and surety is still in force and effect.

So no hardship is present to demand the repetition of that bond in this court, even if this court had full authority under the Circuit Court of Appeals Act to require a bond of that character in cases brought to this court by writs of *certiorari*.

The statutes of many of the states provide that an appeal from a decree dismissing an injunction bill will not continue the injunction without an order to that end entered by the trial or by the Appellate Court.

Yet counsel have not presented a single case in which the court held that a second injunction bond was required before entry of an order to continue the injunction pending the appeal.

The injunction bond already in force extends from the issue of the injunction to the final disposition of the case, and counsel have neither submitted any statute or decision of any court providing or holding that the defendant was entitled to two injunction bonds, with like conditions to secure the defendant against the same damages.

Unless this court holds that its judgment of reversal, if so rendered, would displace every order or judgment adverse to appellee entered or made subsequent to the final decree of the trial court whether made by the Circuit Court of Appeals or the trial court upon its mandate, this motion should be granted.

Respectfully submitted.

G. W. KRETZINGER.
E. C. FIELD.
JAMES S. PIRTLE.

No. 254 and 255.

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Brief of Kretzinger & Field for Appellee

Supreme Court of the United States,

OCTOBER TERM, A. D. 1897.

Filed Nov. 8, 1897.

THE LOUISVILLE TRUST COMPANY,
Appellant,

254. *vs.*

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY,
Appellee.

THE LOUISVILLE BANKING COMPANY,
Appellant,

255. *vs.*

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY,
Appellee.

On Writs of *Certiorari* to the United States Circuit Court of Appeals for the Sixth Circuit.

STATEMENT OF FACTS, STATUTES INVOLVED, ASSIGNMENT OF ERRORS AND ARGUMENT FOR APPELLEE.

G. W. KRETZINGER,
E. C. FIELD,
JAMES S. PIRTLE,
Solicitors for Appellee.

HARRARD & MILLER PRIP'G. CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

THE LOUISVILLE TRUST COMPANY, *Appellant,*

54. *vs.*

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY, *Appellee.*

THE LOUISVILLE BANKING COMPANY, *Appellant,*

55. *vs.*

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY, *Appellee.*

On Writs of *Certiorari* to the United States Circuit Court of Appeals, for the Sixth Circuit.

STATEMENT OF FACTS, STATUTES INVOLVED, ASSIGNMENT OF ERRORS and ARGUMENT FOR APPELLEE.

Appellee brought this suit in chancery in the Circuit Court of the United States for the District of Kentucky, alleging it was at that time a corporation of the States of Indiana and Illinois, by consolidation of certain Indiana railway corporations with a certain railway corporation of the State of Illinois, pursuant to the laws of such states; that defendants, the Louisville Trust Company, the Ohio Valley Improvement Company (hereinafter called the Contract Company), the Richmond, Nicholasville, Irvine and Beattyville Railway Company (hereinafter called the Beattyville Company), the Louisville Safety Vault and Trust Company, and the natural persons now remaining with them as co-defendants in the suit, are and were at the date of its commencement citizens of states other than the States of Indiana and Illinois.

Appellee prayed to have adjudged void and canceled

the contract with the Contract Company and the guaranty upon certain bonds of the Beattyville Company, and for perpetual injunction to restrain suit thereon upon the ground that appellee's directors had neither statutory power or authority to direct their execution.

(See bill, Tr. 1, and proposed amended bill, Tr. 206.)

The motion for temporary injunction was resisted and heard before Associate Justice Barr and Circuit Judge Jackson, afterwards a member of this court. Upon full argument an injunction was ordered to issue as prayed in the bill.

Thereafter appellee filed its supplemental bill, and defendants or some of them filed demurrers which were heard and overruled by Circuit Judge Lurton and District Judge Barr.

On final hearing Hon. John W. Barr, District Judge, decreed the guaranty void, should be canceled and suit thereon against appellee perpetually enjoined.

On appeal the cause was heard before Taft, Circuit Judge, and Severns and Hammond, District Judges, and decision was delivered June 22, 1896, by the Circuit Judge, reversing the decree holding the contract and guaranty valid (Op. Court of Appeals, Tr., 160), and directing the lower court to dismiss appellee's bill. (Tr., 200.)

Petition for rehearing was duly filed (Tr., 201), and denied without an opinion. (Tr., 219.)

Appellee also moved the Court of Appeals to modify its mandate and thereby allow appellee to file its amended bill in the court below, and with such motion submitted the amended bill proposed (Pet. to modify amended

and supplemental bill, Tr., 204), which motion was overruled without an opinion. (Tr., 219.)

November 9, 1896, appellee on petition moved this court to order by *certiorari* the Court of Appeals to certify to this court the above entitled causes, which was accordingly done, and pursuant thereto the record is before this court for correction of the errors hereinafter assigned.

STATEMENT OF ADMITTED FACTS.—THE STATUTES HERE INVOLVED, THEIR PROVISIONS, THE DATE OF THEIR ENACTMENTS, ETC.

First. The Beattyville Company was created under a special Kentucky act to construct and operate a line of railroad wholly in that state from Versailles to Beattyville. Later the Contract Company was incorporated under a special Kentucky act to construct railways.

Second. October 11, 1888, the Contract Company contracted with the Beattyville Company to construct its road from Versailles to Beattyville, a distance of about ninety miles (its nearest terminus to Louisville being about sixty-five miles), and to take as pay part of its stock and all of its first bonds. (See contract, Tr., p. 16.)

A quorum of appellee's directors, without corporate power or authority, agreed with the Contract Company to guarantee the Beattyville bonds and to receive three-fourths of the Beattyville stock that came to the Contract Company for construction, the terms of which contract and form of guaranty will be noted later.

Third. In 1872 the *old* Louisville, New Albany and Chicago Railway Company (NOT THE APPELLEE) was in-

corporated under Indiana law, with express authority to acquire and operate a railroad from New Albany to Michigan City, all in Indiana. Thereafter that company acquired and operated that line until its consolidation, as hereafter shown.

Fourth. That the State of Kentucky granted to the old New Albany Company permission and license by special act of its legislature, approved April 7, 1880, to acquire terminal facilities in Louisville, and to come to that city from its southern terminus at Albany, Indiana, to transact its interstate business.

That sections 1 and 2 of the Kentucky act under which the Court of Appeals held that appellee's Indiana constituent was created a Kentucky corporation, and thereupon became a corporate citizen of Indiana, are as follows:

Be it enacted by the General Assembly of the commonwealth of Kentucky:

> "1. That the Louisville, New Albany and Chicago Railway Company, *a corporation organized under the laws of the State of Indiana*, is hereby constituted a corporation, with power to sue and be sued, contract and be contracted with, to have and use a common seal, with the power incident to corporations and authority to operate a railroad."
>
> "2. That the Louisville, New Albany and Chicago Railway Company is hereby authorized to purchase or lease for depot purposes in the city of Louisville, or county of Jefferson, such real estate as may be deemed by it to be necessary for passenger and freight depots and transfer, machine shops and for all switches, and turnouts necessary to reach the same; and is also authorized to connect with any railroad or bridge now operated or used, or which may be hereafter operated or used, in said county of Jefferson, and may build any such connecting lines, or lease or operate the same, and for

all such purposes shall have the right to condemn all property required for the carrying out of the objects herein named, and may bond the same, and secure the payment of any such bonds by a mortgage of its property, rights and franchises."

4. This act shall take effect from and after its passage.

"Approved, April 8, 1880."

That the Old New Albany did acquire certain terminal facilities in the city of Louisville, incidental to its Indiana railroad.

Without provision and authority in *that Act* for stockholders, officers, annual meetings, special meetings, capital stock, amount of its issue, mode for its subscription, and manner of its transfer, no corporate organization could occur thereunder and none was ever attempted.

The stockholders, directors and officers of the Indiana New Albany never acted or assumed to act as the stockholders, directors and officers of the alleged Kentucky corporation, and it had none.

Fifth. The Chicago and Indianapolis Air Line Railway Company (hereafter, called the Air Line) was an Indiana corporation authorized to construct and acquire a railroad wholly in that state from Indianapolis to Dyer; thereafter, the Air Line consolidated with the Chicago and Dyer Railroad Company, an Illinois corporation having full corporate power to build and operate a railroad from Chicago to a point upon the line dividing the States of Indiana and Illinois; that thereafter and of date May 5, 1881, the old New Albany and the company created by consolidation of the Indiana Air Line and the Illinois Dyer, executed by authority of their respective boards articles for consolidation of their managements, roads, stocks and franchises, which articles (see

Tr., 25), recite and contain among other things, the following :

"This agreement was made this 5th day of May, A. D. 1881, between the Louisville, New Albany and Chicago Railway Company as party of the first part, and the Chicago and Indianapolis Air Line Railway Company, as party of the second part:

Witnesseth: That whereas the party of the first part is a corporation existing under the laws of the State of Indiana, with a share capital of $3,000,000, and has constructed, owns and operates a line of railroad extending from the city of New Albany, Floyd county, Indiana, to Michigan City, La Porte county, in the same state, and

Whereas, The said party of the second part is a consolidated corporation, *organized and existing under the laws of the States of Indiana and Illinois* with a share capital of $2,000,000, and has in process of construction a line of railway extending from the city of Indianapolis, Marion county, Indiana, to a connection with a railroad at or near Glenwood, Cook county, Illinois, so as to secure a connection and entrance to the city of Chicago, Illinois, and

Whereas, The lines of railroad so described as aforesaid and belonging respectively to said parties of the first and second parts intersect and connect with each other at Bradford, White county, Indiana, so as to allow the free interchange of traffic between each other, and if joined, united and consolidated, would form a line of railroad connected from the cities of New Albany and Indianapolis, Indiana, to the city of Chicago in the State of Illinois, and

Whereas, The said parties hereto have full power and authority *under the laws of the States of Illinois and Indiana* to consolidate their stocks and properties, * * * etc.

Now, therefore, in consideration of the premises * * * the first and second parties do hereby mutually covenant and agree * * * to unite, merge and consolidate the said two corporations and all their railroads, properties, stock and fran-

chises of every kind so as to create and form a consolidated corporation, to be called and known as the 'Louisville, New Albany & Chicago Railway Company,' on the terms and conditions hereinafter specified."

Article 2 conveys to such consolidated company all the properties and franchises of the Indiana and Illinois constituents.

Article 3 provides that,

"The said consolidated corporation hereby created shall be vested with all the rights, privileges, immunities and franchises which usually pertain to railroad corporations *under the laws of the respective States of Illinois and Indiana*," etc.

Article 4 made the united stocks of the constituents the authorized issue of the consolidated stock and made stockholders of the constituent's stockholders of the consolidated company with the right to exchange constituent for consolidated stock, upon the agreed basis.

Article 7 provided that immediately upon the consummation of the consolidation the board of directors of the first party, the Indiana constituent should constitute the board of directors of the consolidated company until its first election.

(See articles of consolidation, record pp. 25–28.)

Note. At that date there was *no law* in force in Indiana or Illinois authorizing railroad corporations of those states to guarantee bonds of another corporation in their own or in adjoining states, and the absence of such power was in full legal effect an express prohibition against its exercise."

About a year after appellee was created a corporation by the consolidation of Indiana and Illinois companies, the Kentucky legislature passed an act which appellant

contends vested in the directors the power to authorize the executive officers of appellee (an Illinois and Indiana corporation), to make the guaranty in question, to wit:

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"1. That the *Louisville, New Albany & Chicago Railway Company* is hereby authorized and empowered to indorse or guarantee the principal and interest of the bonds of any railway company now constructed, or to be hereafter constructed, within the limits of the State of Kentucky, and may consolidate its rights, franchises and privileges with any railway company authorized to construct a railroad from the City of Louisville to any point on the Virginia line, such endorsement, guarantee or consolidation to be made upon such terms and conditions as may be agreed upon between said companies; or it may lease and operate any railway chartered under the laws of the State of Kentucky; provided it shall not lease or consolidate with any two lines of railway parallel to each other; or it may make such traffic arrangement or agreement with any such before mentioned road as its board of directors may deem proper."

"2. This act shall take effect upon and after its passage."

Approved April 7, 1882.

Sixth. Nearly two years after appellee became an Indiana and Illinois corporation by consolidation, the Indiana legislature passed an act and therein expressly prohibited the guaranty of any railroad bonds in a foreign state by a mere resolution or act of directors or agents, and limited the guaranty to a specified class, said law being approved March 8, 1883, to wit:

Revised Statutes of Indiana: "3,951 *a*. GUARANTY OF BONDS OF ANOTHER COMPANY.

1. The board of directors of any railroad company organized under and pursuant to the laws of the State

of Indiana, *whose line of railway extends across the state in either direction, may*, UPON THE PETITION OF THE HOLDERS OF A MAJORITY OF THE STOCK OF SUCH RAILWAY COMPANY, direct the execution by such railway company of an endorsement guaranteeing the payment of the principal and interest of the bonds of any railway company organized under or pursuant to the laws of any adjoining state, *the construction of whose line or lines of railway would be beneficial to the business or traffic of the railway so endorsing or guaranteeing such bonds.*"

"3,951 *b*. PETITION OF STOCKHOLDERS. 2. *The petition of the stockholders specified in the preceding section of this act* SHALL STATE THE FACTS *relied on to show the benefits accruing to the company endorsing or guaranteeing the bonds above mentioned.*

That the stockholders of (appellee) the Consolidated New Albany Company *never at any time* considered or determined the question of "*benefits*" nor presented a petition to the directors thereof touching said alleged guarantee and *no* recitals appear in said guaranty with respect thereto.

Seventh. The general statute of Indiana from which the Court of Appeals in its opinion quoted Secs. 3949 and 3951, will be considered in argument.

Eighth. The alleged contract with the Contract Company for the guarantee in question contains the provision and recites the form of the guaranty to be endorsed, as follows:

"4th. The said New Albany Company agrees to and with the said Construction Company that it will, from time to time, as the said first mortgage bonds are earned by and delivered to the said Construction Company pursuant to the terms of their said construction contract,

guarantee the payment by the said Beattyville Company of the principal and interest of the said bonds in manner and form following; that is to say, by endorsing upon each of said bonds a contract of guaranty as follows:

> "'For value received the Louisville, New Albany & Chicago Railway Company hereby guarantees to the holder of the within bond the payment by the obligor thereon, of the principal and interest thereof, in accordance with the tenor thereof. In witness whereof the said Railway Company has caused its corporate name to be signed hereto by its president, and its seal to be attached by its secretary.'
>
> "6th. In consideration of the premises, the said Construction Company agrees to transfer and deliver to the said New Albany Company three-fourths of the entire capital stock of the said Beattyville Company, the said delivery to proceed *pari passu* with the guaranteeing of the said bonds by the said New Albany Company: $3,000 at par of the said stock being delivered for each $4,000 of bonds guaranteed."

The guaranty in the above form was written on 1,185 of said bonds and was signed in the following form:

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY,
By W. M. DOWD,
[SEAL.] *President.*
ATTEST:
JOHN A. HILTON,
Assistant Secretary.

(See contract, Tr., page 16.)

Ninth. The next day after the guaranty had been written on the last 585 bonds, to wit: on March 12th, the annual meeting of the stockholders of appellee convened for and did elect a new board of directors, and thereupon adjourned to convene March 22, and at such adjourned meeting the new board reported that

at a special meeting of the old board, held in the city of New York, October 9, 1889, only eight of the thirteen old directors were present, and they assumed to pass a resolution authorizing the execution of the aforesaid paper writing and guaranty of the Beattyville bonds thereunder; that such action was so taken by these eight directors without any notice to the other directors or stockholders of appellee; that at that date the eight directors so assuming to act only held and owned in the aggregate some 400 shares of appellee's stock out of 50,000 shares. (See original bill, Rec., 1, and proposed amended bill, Rec., 204.)

That thereupon the stockholders at such adjourned meeting, by resolution and by vote of over 32,000 shares of stock, *repudiated said paper writing and refused to approve the same;* that this was the *first* stockholders' meeting that convened, and the *first* notice these new directors and stockholders had of the attempted execution of this contract and guaranty. And they authorized and directed legal proceedings to be taken, if necessary, to have such unauthorized and illegal contract and attempted guaranty canceled and their enforcement against appellee enjoined; that notice of this repudiation was immediately served upon the Contract Company, and the cancellation of the attempted guaranty demanded; that on the 9th day of April, 1890, eighteen days after such repudiation by appellee's stockholders, it filed its bill for relief against such pretended contract and guaranty as therein prayed.

Tenth. The following facts were admitted and stipulated into the record by appellants:

> "That no petition of any of the stockholders of the said company requesting said endorsement in

the manner pointed out in section 3951 A. B. C. of the statutes of Indiana, or in any other manner was ever signed or executed, and no authority was conferred by said stockholders upon such directors, and such directors had *only* such authority as existed by virtue of their existence as such directors.

It is further agreed that the guaranteed bonds referred to, numbered from one to 600 inclusive, were endorsed with such guarantee by the officers of the Louisville, New Albany and Chicago Railway Company on the day of December, 1889; that 585 of such bonds numbered from 601 to 1,185, inclusive, were so endorsed and delivered on the 11th of March, 1890; that the regular meeting of the stockholders of the Louisville, New Albany and Chicago Railway Company convened on the next day, March 12, 1890, and no meeting had been held after the above contract of guarantee had been entered into until such regular meeting was held on the 12th day of March, 1890, and on which day a majority of the board of directors were changed, and such meeting then adjourned to the 22nd day of March, 1890; that at such adjourned meeting the board of directors reported to the stockholders that the before mentioned bonds had been guaranteed, and a resolution was adopted by a majority of all the outstanding stockholders objecting thereto and disclaiming any liability by reason of such guarantee."

(See stipulation tr. 60.)

Eleventh. During the period covered by the foregoing transactions, appellee was not authorized by any Illinois law to purchase the stock or guarantee the debt of any other corporation or enterprise.

Twelfth. Touching the foregoing statutes, and upon final hearing, Judge BARR, among other things, held:

"The decision of Justice Brewer and Judge Jackson, after full consideration, that this court had jurisdiction of this cause and the granting of the injunc-

tion should, we think, settle for this court some of the questions argued by counsel.

This decision determined that the complainant is an Indiana corporation and *not* a Kentucky one; hence, whatever authority the complainant had or has to guarantee the mortgage issued by the Richmond, Nicholasville, Irvine and Beattyville Railroad Company is derived from the corporate powers granted by that state. *It also determined* that upon the then showing the complainant was entitled to an injunction to prevent the disposition by the Ohio Valley Improvement and Contract Company and others of the bonds of the Beattyville Railway Company with the guarantee of the complainants upon them.

* * * * *

The consideration of the guarantee on the coupon bonds of the Beattyville Railway Company was to be the delivery of three-fourths (¾) of the capital stock of that railway company to complainant by the Ohio Valley Contract Company.

The guaranty which was endorsed on $1,185,000 bonds is as follows":

(Then follows the words of the guaranty as heretofore shown.)

The court then cited sections 3951–a, b and c, of the Indiana statutes, which is fully quoted with the other statutes here presented. Judge BARR then continued:

"The provisions of the Indiana statute seem to have been ignored and the guaranty made presumably under the supposed authority of an act of the State of Kentucky approved April 7, 1882. *But as complainant is not a Kentucky corporation, this guaranty cannot be sustained or aided by this statute.*

By the Indiana statute quoted * * * *the stockholders, and not the board of directors*, are to take the initiative, and a majority thereof determine whether there shall be a guaranty of the bonds of another company. * * * *But the authority*

does not exist except by and through the stockholders. The provision of this statute which requires the facts which are relied on to show the benefit accruing to the company endorsing or guaranteeing the bonds, to be stated in the stockholders' petition, clearly shows *the authority* to guarantee the bonds of another company *was not intended to be given the board of directors.*

"There is no question here as to the effect of a subsequent approval or ratification of the guaranty of these bonds by the board of directors by the stockholders, *as their action was promptly repudiated* by them the first meeting after the guaranty was made, and, presumably, as soon as it was practical to have had a stockholders' meeting."

The court then refers to other Indiana statutes, and to the provisions thereof stated and quoted in the opinion of the Circuit Court of Appeals, and of them says:

"These powers are such as to consolidate with other railroad companies and to buy and lease by way of extension of their railway lines, other railroads, etc., but the authority to guarantee the bonds of another railroad company is given in express terms in section 3,951, and the mode prescribed, and we think this precludes any implied authority arising to guarantee bonds in cases covered by that section in the exercise of other corporate powers given in other parts of the statute."

Judge BARR then cited and quoted, and thereon held that the guarantee was void as between appellee and the Ohio Valley Contract Company, and as to the rights of defendants as alleged innocent purchasers, said:

"The nature of the contract should have been notice to all purchasers to inquire into the corporate powers of the guaranteeing railway company, *as it was unusual and outside of the ordinary business of a railway company either in operating or constructing railroads.*

Purchasers on the bond market were bound to

know that the president and board of directors of complainant were not the corporation, but its agents, and that the corporate power to guarantee these bonds did *not ordinarily* exist in the directory. There were *no recitals* either in the resolution of the board of directors or in the guaranty itself to mislead the purchaser or stay inquiry. * * *

In speaking of notes and bonds issued or accepted by an agent, acting under a general or special power, the Supreme Court says: 'In each case the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper *cannot* be used to establish the authority by which it was originally issued.' See Floyd Acceptances, 7 Wall., 676, and approved in *Marsh* v. *Fulton County*, 10 Wall., 683."

The judge then quotes *Merchants Bank* v. *State Bank*, 10 Wall., and said:

"This language is applicable as in that case where the company had the corporate authority to make the contract and the agent who made it was within the general scope of his duties, though not especially authorized to make the contract in controversy, *but it cannot be true*, broadly stated, else stockholders in corporations would be without the protection of limitations and conditions placed upon their corporation by the charter, *and the state itself* would be without the power to prescribe conditions to the exercise of corporate powers or prescribe the mode or agencies by which corporate powers should be exercised.

* * * * *

This condition, precedent to the corporate authority of the board of directors, was not performed, or attempted to be performed. * * * We do not therefore, see that the position of these bondholders

who are *bona fide* purchasers without notice is other or different from that of the Ohio Valley Company."

Judge BARR concluded:

"In the case at bar the initiative was to be taken by the stockholders, and they were to determine whether there should be a guaranty, and direct the directors by a petition in writing giving the facts upon which they based their determination. This extraordinary corporate power was to be exercised by the stockholders themselves, and not their agent, the board of directors, and in a way and manner that all who dealt with the corporation could know if they desired. These two cases (*Tappan* v. *Ry. Co.*, 1st Flippin, 75, and *Zabriskie* v. *Ry. Co.*, *supra*), both in principle and facts, fall far short of the present case."

In so holding Judge Barr adopted and concurred in the decisions of Associate Justices Brewer and Jackson and Circuit Judge Lurton in overruling the plea to the jurisdiction of the court, in granting the motion for a temporary injunction and in overruling the demurrer to the original bill and supplement, as above stated.

THE CONCLUSIONS REACHED BY THE CIRCUIT COURT OF APPEALS ARE INCONSISTENT AND DIRECTLY IN CONFLICT WITH DECISIONS OF THIS COURT.

Among the holdings of the Circuit Court of Appeals are:

1st. After holding that appellee was not a Kentucky corporation, and that, if it was, it was not as such a party to this suit (op. Rec., p. 167), it held that it was the intention of the Kentucky legislature

"to make that which was an Indiana corporation a corporation of the State of Kentucky" (op. Rec. p. 168),

and as such appellee was authorized by Kentucky law, to make the contract in question.

2d. That the Kentucky act of 1880 created appellee into another corporation in Kentucky, but inasmuch as appellee was the *sole* incorporator named in that act, and was a corporate citizen of Indiana, its corporate citizenship could not be imputed to Kentucky. Therefore appellee, as such Kentucky corporation, must be deemed and taken as a corporate citizen of Indiana; that is, Kentucky by this act created a Kentucky corporation in Indiana with Kentucky powers for exercise (op. Rec. p. 168).

It then held :

(*a.*) That appellee was not a Kentucky corporation.

(*b.*) That if there was such Kentucky corporation, it was not a party to this suit.

(*c.*) That if the Kentucky act did create a corporation, it and the Indiana company were distinct corporations, therefore one could be liable and the other not.

(*Note.* Neither the directors in assuming to authorize the contract or guaranty, or the executive officers in signing the same, purported or assumed to act for or in the name of the Kentucky corporation, which, in fact, had *no* directors, stockholders or officers.)

Yet the Court of Appeals held that the guaranty was, in fact, executed by the Kentucky corporation and also by appellee as a corporation of Indiana and Illinois; and as to forty five bonds, the Court of Appeals ordered that the same be

> "stamped under the endorsement of the guaranties the words: 'This guaranty is binding only on the Louisville, New Albany and Chicago Railway Com-

pany, a corporation of Kentucky. It is not binding on the Louisville, New Albany and Chicago Railway Company, a corporation of Indiana and Illinois.'

"The complainant (appellee) is also entitled to an order enjoining suit on these bonds as a corporation of Indiana and Illinois."

Thus the Court of Appeals held that two corporations executed the guaranty; *first*, the Kentucky corporation, and *second*, appellee as "a corporation of Indiana and Illinois," although appearing to be signed by appellee, *only*, and by the above order released appellee as the latter corporation and held the Kentucky corporation, thus making another and different contract of guaranty.

3d. The Court of Appeals further held: That as to purchasers with knowledge the guaranty was void, *because* the directors had no statutory power to authorize the execution of the guaranty, and could have no authority to direct the same without petition from the stockholders as required in the Indiana act of 1883; but as to purchasers without notice the actual endorsement of the guaranty by such unauthorized direction of the directors bound the stockholders *without* their knowledge or consent, notwithstanding their prompt repudiation of both contract and guaranty. (op. Rec., pp. 179, 166.) Judge Barr found and held that the repudiation was promptly made at the first meeting upon first notice (Tr., 69), and the Court of Appeals concurred therein.

4th. That the Kentucky company passed into the consolidation of the Indiana and Illinois corporation *without* it appearing in the articles of consolidation that such Kentucky company was a party thereto by name or reference, said articles being only executed by the

Louisville, New Albany and Chicago Railway Company *as* an Indiana corporation.

5th. That where a special power is vested *by express* statute in a designated body for exercise, a purchaser may presume that the same has been exercised by *such* body from the *mere* act of some *other* body, or from the *mere* manual signature of an executive officer of the corporation.

6th. That the *mere* act of the stockholders in electing directors, clothed the directors with the appearance of authority to exercise *special* power in addition to general or usual powers, notwithstanding the legislature vested the exercise of such *special* and *unusual* power exclusively and directly in the stockholders, and counsel for appellant admitted by stipulation (heretofore shown), that "*such directors had* ONLY *such authority as existed by virtue of their existence as such directors.*"

7th. That notwithstanding the question, as to whether the Beattyville bonds were within the Indiana statute for guaranty, had been expressly committed by the Indiana legislature to the stockholders for decision, persons purchasing the Beattyville bonds with the guaranty endorsed thereon might presume without recitals to that effect that that question had been determined by the stockholders *even* though such bonds were *not* within the Indiana statute.

8th. That the stockholders did promptly determine the question at the first notice and by resolution repudiated the contract of guaranty, which action of the stockholders was wholly disregarded by the Court of Appeals. (Op. Court of Appeals, Tr., 197; Op. Judge Barr, Tr., 69.)

9th. That a statute expressly vesting special power in the stockholders for exercise is a mere regulation between the members, and of the same effect as if written in the by-laws, or resolution of the board.

10th. That a purchaser may indulge a presumption which becomes a substitute for special statutory authority to an alleged agent, and that this presumption arises in the absence of the receipt of any consideration by the guarantor from the purchaser, and in the absence of recitals or representations sufficient to create or feed an estoppel.

11th. The decision of the Court of Appeals in the above particulars and in other fundamental matters is in vital conflict with the decisions of this court and the rule uniformly applied in the interpretation and construction of statutes, creation of corporations, corporate powers and corporate agencies.

APPELLEE'S ASSIGNMENT OF ERRORS.

The Circuit Court of Appeals erred in holding, to wit:

1. That appellee was a Kentucky corporation.

2. That the guaranty was executed by appellee as a Kentucky corporation and was also executed by appellee as an Indiana corporation.

3. That the alleged Kentucky Company, without stockholders, directors or officers, could or did act touching said contract and guaranty.

4. In adjudicating touching any Kentucky corporation when the same was not a party to the suit.

5. That appellee, an Indiana and Illinois corporation, ever acted through its stockholders, directors or officers as a Kentucky corporation.

6. That appellee as an Indiana and Illinois corporation had corporate power by virtue of the Kentucky acts in question to make the guaranty here involved.

7. That the Beattyville bonds were within the terms of the Indiana statute for guaranty without and before the stockholders considered and decided that the Beattyville road "would be beneficial to the business or traffic of" their Indiana road.

8. That the directors of appellee as an Indiana and Illinois corporation had any authority whatever under the Indiana act of 1883.

9. That appellee's directors had legislative authority to contract for the stock of the Beattyville Company and to assume its bonded debt by guaranty.

10. That appellant had the right to presume from

the mere execution of the guaranty, without recitals, that the directors of appellee as an Indiana and Illinois corporation had requisite legislative authority to direct the execution of the guaranty in question or to presume that the conditions precedent in the Indiana act of 1883, had been performed.

11. That appellee and its Indiana and Illinois stockholders were estopped by such action of the directors and by the mere execution of the guaranty in question.

12. That the Indiana and Illinois stockholders of appellee had no right or power to effectually repudiate and disaffirm said guaranty promptly upon first notice.

13. That the directors of appellee as general agents in the exercise of general corporate power could lawfully direct the execution of such contract and guaranty with the same binding force and effect as in the exercise of the general corporate powers exercised in the transaction of appellee's usual corporate business.

14. That the Indiana act of 1883 in expressly withholding power from the directors to direct the execution of such guaranty without the petition of the stockholders therein expressly required was a mere internal regulation of the corporation equivalent to a by-law or secret resolution.

15. In overruling petition for rehearing and motion to modify mandate to permit filing of amended bill.

16. The decision and judgment of the Circuit Court of Appeals are against the admitted facts and contrary to law and equity.

ARGUMENT.

I.

THE KENTUCKY ACT OF 1880 DID NOT CREATE A CORPORATION. IT WAS NO MORE THAN AN ENABLING ACT OR LICENSE.

Court of Appeals quoted from Kentucky act:

> "That the Louisville, New Albany and Chicago Railway Company, a corporation organized under the laws of the State of Indiana, is hereby constituted a corporation," etc., and thereon held:
>
> "It would be difficult to express in concise language any more clearly than is here done, the intention of the legislature to create a new corporation."

Then follows the sole power granted in the Kentucky act, namely, to acquire terminal facilities in Louisville, which, as hereafter shown, might have been acquired through comity in the absence of any prohibitory legislation in Kentucky.

In *Ry. Co.* v. *Ry. Co.*, 118 U. S., 295, held:

> "And so a corporation of Illinois authorized by its laws to build a railroad across the state from the Mississippi river to its eastern boundary may by permission of the state of Indiana extend its road a few miles within the limits of the latter, or, indeed, through the entire state * * * without thereby becoming a corporation or a citizen of the state of Indiana. The mere grant of privileges or powers to do it as an existing corporation, without more *does not do this*," etc.

In *N. & C. Co.* v. *Wooley*, 78 Ky., (p. 525), held:

> "Each legislative power must complete the corporation, or it never can be one, because the completing act of one state is not binding upon the state

> which began, but failed or refused to complete and give legal existence to the corporation. Otherwise persons who should receive from a state only a part of the powers, but were denied the rest which were necessary to create a corporation, could apply to a foreign state for supplementary legislation which would authorize the building of railroads and bridges upon our soil, and give to its laws an extra territorial force—a doctrine that has always been successfully denied among these states which hold the relation to each other to foreign states in close friendship. The creative power of one state can neither be added to nor subtracted from by another, so as to strengthen or weaken the power of the former in its own territory."

Here the alleged Kentucky corporation could not act without borrowing Indiana stock, stock-votes, directors, and corporate officers created, and existing under Indiana legislation, their Indiana power to act as such and their Indiana corporate authority to exercise the same.

The holding of the Court of Appeals that that act created a corporation—made an Indiana corporation as sole incorporator, a Kentucky corporation, cannot be sustained upon principle or authority.

All cases cited in the opinion of the Court of Appeals upon that point are relieved of the interpretation and force given by that court, or are directly overruled by *Railway Company* v. *James*, 161 U. S., 545, which it cited in support of its holding.

That the Court of Appeals misread and misapplied *Railway Company* v. *James*, *supra*, and that its holding is in conflict with the decisions of this court, we submit:

First. In this act the Kentucky Legislature expressly dealt with the New Albany Company as "a corporation

organized and existing under the laws of the State of Indiana." (See Sec. 1, Kentucky act of 1880, ante p. .)

The Arkansas statute involved in *Railway Co.* v. *James*, 161 U. S., 551, provided

> "That every railroad corporation of any other state which has heretofore leased or purchased any railroad in this state shall * * * thereupon become a corporation of this state, anything in its articles of incorporation or charter to the contrary notwithstanding," etc.
>
> "* * * and upon the filing" (of certified copies) "of such articles of incorporation or such charter, with a map and profile of the proposed line and paying the fees prescribed by law for railroad charter such railroad company shall, to all intents and purposes, become a railroad corporation of this state, subject to all the laws of the state now * * * in force and hereafter enacted, the same as if formally incorporated in this state, anything in its articles of incorporation or charter to the contrary notwithstanding, etc., and such acts on the part of such corporation shall be conclusive evidence of the intention of such corporation to create and become a domestic corporation."

In that case, the Railway Company complied with the requirements of this statute.

In the construction of that statute this court held:

> "It should be observed that in the present case the corporation defendant was not incorporated as such by the State of Arkansas. The legislature of that state was professedly dealing with a railroad corporation of other states."

So here, the Kentucky act did not deal with the personal stockholders or incorporators of the Indiana Company, but with the Indiana corporation itself. It made no provision for stock, stockholders, directors or officers. It was merely an enabling act or license to acquire termi-

nal facilities in the County of Jefferson and City of Louisville.

(See Sec. 2, Kentucky Act, 1880, *ante* p. .)

In *Ry. Co.* v. *Harris*, 12 Wall., 81, held:

> "The permission was broad and comprehensive in its scope; BUT IT WAS A LICENSE AND NOTHING MORE. It was given to the Maryland corporation as such, and that body was the same in all its elements and in its identity afterwards as before."

Why? Because this court, in that case, found and held, that

> "In its name, locality, capital stock, election and power of its officers, and the mode of declaring dividends and doing of its business, its unity was unchanged."

Second. The Circuit Court of Appeals held:

> "The Kentucky corporation, having been once established, could not die except by its own act or that of the state which gave it being."

If the New Albany, as *sole* incorporator, became a Kentucky corporation, we have, then, as *sole* incorporator, a corporate creature of Indiana, which might be destroyed by that State by writ of *quo warranto*, or by consolidation with some other Indiana company, thereby submitting to dissolution. *McMahan* v. *Morrison*, 16 Ind., 172; in *Shields* v. *Ohio*, 95 U. S., .

In *Railway Co.* v. *Hendricks*, 40 Ind., 60. Held:

> "It (one of the constituents by consolidation) *ceased to have any officers or agents;* IT CEASED TO BE A SEPARATE LEGAL ENTITY. Instead of two, there was now but one corporation made up of the mingled elements of the two pre-existing companies, so combined and merged that neither could be separately identified or brought into court.

In *Ry. Co.* v. *Bonney*, 117 Ind., 504, in which appellee's creation by consolidation was involved, held :

> "The effect of the statutory consolidation is however, practically to dissolve the old corporations into the new, which takes their place, succeeds to all the property, etc."

Thus the Indiana Company, sole incorporator of the alleged Kentucky Company, and described in the Kentucky act of 1880 as a corporation organized under the laws of the State of Indiana ceased to exist on May 5, 1881, the date of its consolidation with another Indiana and Illinois corporation and thereafter "ceased to have any officers or agents." Therefore on April 8, 1882, the date of the passage of the Kentucky amendment, there was no such corporation with a corporate organization, with stock, stockholders, directors or officers to receive or exercise the alleged corporate powers tendered therein.

Third. The Circuit Court of Appeals held that this court decided (*Ry. Co.* v. *James*) that the

> "Missouri Company might be a corporation of Arkansas by virtue of the statute making it such," etc.

It is clear that that court either overlooked or misinterpreted the following clear and unambiguous language of this court. (p. 564.)

> "It is therefore obvious that such purchase by the Missouri corporation of the railroad and franchises of the Arkansas companies did NOT *convert it* into an Arkansas corporation;" that "it would be *necessary* to create it out of *natural* persons whose citizenship of the state creating it could be imputed to the corporation itself."

Fourth. The Court of Appeals further held that,

inasmuch as the *sole* incorporator of the alleged Kentucky company was an Indiana corporation, *no* presumption of its Kentucky citizenship could arise. Therefore, this *Kentucky* corporation was a corporate citizen of *Indiana*. (Op. C. C. A. Tr., p. 168.) If this novel position is maintained, it conclusively follows that, instead of the Kentucky legislature creating a Kentucky corporation, it created an Indiana corporation, and vested it with Kentucky charter powers for exercise. *Such a conclusion is in direct conflict* with every decision of this court involving the creation and citizenship of corporations.

In *Ry. Co.* v. *Gebhardt*, 109 U. S., 537, held:

> "The corporation must reside in the place of its creation, and cannot migrate to another sovereignty (*Bank of Augusta* v. *Earle*, 13 Pet., 588, although it may do business in all places where its charter allows and local laws do not forbid. (*Railroad* v. *Koontz*, 104 U. S., 12.) * * *
>
> Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere. * * * He is conclusively presumed to have contracted with a view to such laws of that government, because the corporation must of necessity be controlled by them, and it has no power to contract with a view to any other laws *with which they are not in entire harmony*.

Parties purchasing Beattyville bonds were bound to look into the charter—articles of consolidation of appellee, and the general railroad laws of Illinois and Indiana which accurately advised them of the exact limitations, within which appellee as a corporation existed and had corporate power for exercise, and that outside of the ownership and operation of railroads in

Indiana and Illinois, and mentioned in such articles, it had *no* corporate existence and therefore *no* power to bind itself either through the action of its directors or by a majority of its stockholders by a guarantee of the bonds of a Kentucky corporation.

This principle, so tersely stated in *Bank* v. *Earle* and re-affirmed in *Ry.* v. *Gebhardt*, *supra*, has been repeated and approved in all subsequent decisions of this court involving this question, and was reaffirmed with judicial emphasis in *Railway Company* v. *James*, *supra*.

Fifth. The authorities cited by the Circuit Court of Appeals refer directly or indirectly to the language of the Supreme Court in *Railway Co.* v. *Harris*, *supra*, p. 82, that

> " the jurisdictional effect of the existence of such corporation as regards the federal courts is the same as that of a copartnership or of individual citizens residing in different states; nor do we see any reason why one state may not make a corporation of another state as there organized and conducted a corporation of its own *quoad hoc* any property within its territorial jurisdiction. "

But for what purpose and to what extent is it a corporation *quoad hoc* its property in a foreign state?

This is a question of power and the corporation entitled to its exercise.

In no case cited by the court of appeals in its opinion, or elsewhere, to our knowledge, has any court held that because a corporation in one state held property in another that it could in that state exercise powers not conferred or prohibited by its home charter.

> " Besides, it would deprive every state of all control over the extent of corporate franchises proper

> to be granted in the state, and corporations would be chartered in one to carry on their operations in another." *Bank* v. *Earle*, *supra*.

Clark v. *Bernard*, 108 U. S., 436, does not sustain the conclusion reached by the court of appeals.

Rhode Island corporate franchises were purchased by the Connecticut Company, and the court was dealing with the Connecticut Company, as an authorized successor to the corporate existence and franchises of a fully equipped Rhode Island corporation.

Likewise in *Railway Co.* v. *Vance*, 96 U. S., 450, where the Illinois legislature declared the Indiana lessee to be a corporate successor of the Illinois lessor.

Otherwise they are both modified by *Railway Company* v. *James*.

The quotation from *Railway* v. *Harris*, was repeated in *Clark* v. *Bernard*, and in subsequent cases, but in *Nashua Railroad* v. *Lowell Railroad*, 136 U. S., 356, and in *Railway* v. *James*, all doubt is removed, and all decisions prior thereto are reconciled or modified, and the doctrine finally and fully announced in *Railway* v. *James*, that a state cannot create a corporation out of a corporate incorporator of another state; that a state can only incorporate the natural persons who may be the incorporators of a foreign corporation, and thereby create a distinct corporation by its own legislation.

Judge SHIRAS, in delivering the opinion of the court (*Railway* v. *James*) and in defining the requisite material for incorporators, said:

> "In order to bring such an artificial body as a corporation within the spirit and letter of that constitution, as construed by the decisions of this court, *it would be* NECESSARY *to create it out of natural*

> *persons*, whose citizenship of the state creating it could be imputed to the corporation itself."

(NOTE.—*Bear in mind* that we are not dealing with corporate successors as in *Clark* v. *Barnard* and *Ry.* v. *Vance*.)

Upon the rule stated and the principle announced in *Railway Co.* v. *James*, the Kentucky legislature was powerless to create a corporation of Indiana, or to create one that can only be deemed or taken as a corporate citizen of Indiana, and endow it with Kentucky corporate powers for exercise through Indiana agencies.

Otherwise, instead of the Kentucky legislature creating a Kentucky corporation, it created an Indiana corporation, which must be held subject to the control of Indiana legislation.

> "And neither state could confer on it a corporate existence in the other, nor add to nor diminish the powers to be there exercised." * * *
>
> "It may, indeed, be composed of and represent, under the corporate name, the same natural persons." (*Ry. Co.* v. *James*, *supra*.)

Such an incorporation by the Kentucky legislature of natural persons by the same name—the name of the Louisville, New Albany and Chicago Railway Company—*is not before the court.*

Sixth. The Circuit Court of Appeals (Tr., 171) referred to certain acts of appellee in its acquirement of terminal facilities at Louisville and gave force thereto in the construction and interpretation of the Kentucky act.

We submit that parties by conduct or by agreement cannot create a corporation, and that

> "no corporation of any state can be made a domestic corporation of another state by simply declaring that it shall be such."
>
> *Reece* v. *Ry. Co.*, 32 W. Va., 164.

In *Goodlet* v. *Railway Company*, 122 U. S., 391, the Tennessee act recited:

> "An act to incorporate the Louisville and Nashville Railroad Company."

Several subsequent amendments were severally entitled:

> "An act to amend an act entitled an act to charter the Louisville and Nashville Railroad Company," etc.

After a review in *Goodlet* v. *L. & N. of Railroad Co.* v. *Harris*, 12 Wall.; *Railroad Co.* v. *Vance*, 96 U. S.; *Memphis and Charleston Ry. Co.* v. *Alabama*, 107 U. S., and *Ry. Co.* v. *Ry. Co.*, 118 U. S., this court held, p. 405:

> "To make such a company a corporation of another state the language used must imply creation or adoption in such form as to confer the power usually exercised over corporations by the state or by the legislature, and such allegiance as a state corporation owes to its creators."

"*Such allegiance*" could only exist and be maintained through stockholders, directors and officers, *none* of which was authorized or provided for in the Kentucky act or possessed by the alleged Kentucky Company.

This court then disregarded the Tennessee act, approved February 1, 1850, incorporating a company by the corporate name of the Louisville and Nashville Railroad Company, and a further act entitled an act to incorporate the Nashville and Louisville Railway Company, *because* it was not shown that any "organization was effected under those acts."

Here it does not appear and has not been contended by counsel that any organization was ever attempted under this Kentucky act. The act makes *no* provision for organization and provides no means or authority to

put in form or action the corporate agencies of a Kentucky organization.

Notwithstanding the Kentucky Company, under the Tennessee acts, constructed and put in operation the railroad therein authorized and issued its stock and bonds thereon, this court held, p. 409:

> "Looking then, at the body of the Tennessee act of December 4, 1851, we find no language clearly evincing a purpose to create a new corporation, or to adopt one of another State, in such form as to establish the same relations in law between the latter corporation and the State of Tennessee as would exist in the case of one created by that State."

If *so much more* in the Goodlet case failed to constitute the Kentucky, a Tennessee corporation, how can *so much less* in this case be held to constitute this Indiana Company a Kentucky corporation?

Seventh. The old New Albany could have acquired the Louisville terminals without the Kentucky act of 1880. That act gave it no more power than the comity of Kentucky would have extended to it for exercise in the absence of prohibitory legislation.

Christian Union v. *Yount*, 101 U. S., 352, held:

> "In harmony with the general law of comity obtaining among the states composing the Union, the presumption should be indulged that a corporation of one state, *not* forbidden by the law of its being, may exercise within any other state the general powers conferred by its own charter, unless it is prohibited from so doing," etc.

Cowell v. *Springs Company*, 100 U. S., 55.

Railway Co. v. *Gebbard*, 109 U. S., 536.

II.

> Without legislative authority and consent of Indiana, the Indiana, New Albany could not enter into a charter contract with the State of Kentucky, and could exercise no powers in Kentucky which it could not exercise at home."

A charter is a contract between the state and the incorporators. If the Kentucky act incorporated the Indiana corporation, using it as its Indiana incorporator, then the Kentucky charter is a contract between the State of Kentucky and its Indiana corporate incorporator.

In *Railway Company* v. *James*, *supra*, held:

> "It is competent for a railroad corporation organized under the laws of one state, *when authorized so to do by the consent of the state which created it*, to accept authority from another state to extend its railroad into such state, and *to receive a grant of power* to own and control by lease or purchase railroads therein, and to subject itself to such rules and regulations as may be prescribed by the second state."

We deny that such Indiana statutory authority existed and respectfully submit that the court of appeals *mis*-interpreted the Indiana statute, as well as the opinion of this court (*James* v. *Ry.*, *supra*). The court of appeals cited and quoted in its opinion the following clause from section 3,951 of the revised statutes of Indiana:

> "May also purchase or contract for use and enjoyment, in whole or in part, of any railroad or railroads, lying within adjoining states; and may assume such of the debts and liabilities of such corporations as may be deemed proper," saying:
>
> "The statutes of Indiana applicable to the company also provided that 'every such railroad corporation

should have capacity to hold, enjoy and exercise, *within* other states, the aforesaid faculties, powers, rights, franchises and immunities, and such others as may be conferred upon it by any law of *this* state in any other state in which any portion of its railroad may be situate or in which it may transact any part of its business;' Revised Statutes of Indiana, 3,949." (See Op. Tr., .)

But observe that the contract in question was not made with the Beattyville Company—did *not* contemplate the acquirement of the Beattyville road by purchase, lease or consolidation. It was simply a contract with the Construction Company to take part of its Beattyville stock, and to guarantee its Beattyville bonds.

The Court of Appeals held:

" We are of opinion that the necessary effect of the act of 1883 was to require that thereafter where a guaranty was deemed a proper means in the exercise of power conferred by section 3951, *it could only be used with the consent of a majority of the stockholders.* Of this view was the Circuit Court, and we concur therein." (See Op. Tr. .)

We submit:

1. That these Indiana statutes did *not* authorize appellee to purchase the stock from the Contract Company and guarantee Beattyville bonds owned by it.

2. That the Indiana statute of 1883 did *not* authorize the purchase of the *stock* of a Kentucky company.

3. That *no* authority can be found in these Indiana statutes authorizing an Indiana railroad company to enter into a charter contract with the State of Kentucky by the reincorporation of its corporate entity in that state, and as shown, no such corporation could be created or could exist without natural persons for incorporators.

Ry. v. *Harris* and *James* v. *Ry. Co.*, *supra.*

Sections 3945 to 3951, inclusive provide for the incorporation of two distinct classes of railroad corporations with appropriate powers for exercise in the acquirement of title to foreclosed railroads and the maintenance and operation thereof.

> 1st. For the incorporation of companies under Indiana laws to purchase at a foreclosure sale railroads *wholly* within that State, the same being covered by the foreclosed mortgage.
>
> 2d. To purchase at foreclosure sale railroads partly within and partly *without* Indiana, the whole being covered by the foreclosed mortgage.

Appellee's Indiana constituent belonged to the first class, and therefore was not controlled by the statute cited and quoted by the Circuit Court of Appeals.

Section 3945 makes this distinction clear. It provides:

> " In case of the sale of any railroad and its property, under or by the authority of any competent court or courts (part of which railroad may be situate within the State of Indiana, and part situate in an adjoining State, and embraced in the mortgage or mortgages or deed or deeds of trust), it may be sold at one time and place, as an entirety," etc.

Section 3947 provides:

> " Such corporation shall possess all the powers, rights, privileges, immunities and franchises in respect to said railroad, or the part thereof purchased as aforesaid, and of all the real and personal property appertaining to the same which were possessed or enjoyed by the corporation that owned or held the said railroad, previous to such sale, by virtue of its charter and amendments thereto and other laws of this state or any other state in which any part of said railroad is situated, *not inconsistent with the laws of this state.*"

It would seem incredible that the Indiana legislature

intended by section 3947 as so clearly expressed therein, to prohibit a corporation, upon its organization to purchase at a foreclosure sale, from taking or exercising powers of the foreign railroad mortgagor "*inconsistent*" with its home power, and then intended by implication to authorize it to exercise inconsistent foreign powers under section 3951, *especially* when clearly repugnant to the restrictions expressed therein.

> Such a holding would violate every well known rule for the construction and interpretation of statutes.

It is manifest from section 3951 that the additional power therein conferred to purchase a railroad which "in whole or in part" is in an "adjoining state," and to "assume such of the debts and liabilities of said corporation as may be deemed proper," does NOT furnish authority to purchase stock, or to guarantee the debt of a railroad *not* foreclosed, acquired or *purchased.*

An assumption of a debt by the purchaser upon property purchased is a part of the purchase price and becomes the debt of the purchaser.

Again, the same section provides:

> "All railroads purchased and branch roads constructed as aforesaid shall be vested in and become a part of the property of the corporation so purchasing or constructing the same as aforesaid, and shall be, in all things, governed by the laws, rules and regulations governing the corporation purchasing or constructing the same as aforesaid, and be operated as part of its line of road."

Thus a company wholly within Indiana that purchases a road, in part or in whole, in an adjoining state remains subject to the laws of Indiana, and operates such road in such adjoining state as a part of its Indiana line.

NO ONE OF THESE SECTIONS EXPRESS OR IMPLY AUTHORITY (*a*) TO RE-INCORPORATE IN ANOTHER STATE (*b*) TO ASSUME THE DEBT OF A ROAD IN AN ADJOINING STATE *not* LEASED OR PURCHASED, OR (*c*) TO CONTRACT FOR THE STOCK OF A FOREIGN COMPANY.

III.

APPELLEE, CREATED BY THE CONSOLIDATION OF ILLINOIS AND INDIANA COMPANIES, COULD NOT BY GENERAL CONTRACT BIND ITSELF IF SUCH CONTRACT WAS NOT AUTHORIZED BY THE STATE OF ONE OF ITS CONSTITUENTS.

The Circuit court of appeals held "that the guaranty was, therefore, a valid obligation of the Kentucky corporation, enforceable against appellee's property in Kentucky."

(Op. Cir. Court of Appeals, Rec. p. 175.)

This guaranty, if valid, creates a general commercial debt. It was not authorized by Illinois statute and was, therefore, prohibited.

Suppose suit was brought in an Illinois court upon a judgment rendered in a Kentucky court upon this guaranty, would such judgment be open to the defense that the guaranty was void under Illinois law? If not, and if the opinion of the court of appeals is sustained, then one state could enforce its legislation upon corporate constituents of consolidated companies in another state, and make courts of such other state powerless to enforce their prohibitory statutes.

We are confident that a doctrine so inconsistent and dangerous will find no support in this court.

State v. *Maine Central Ry. Co.*, 66 Maine, 488, involved this precise question. The court held (p. 497):

> "The corporate rights of the new corporation are those derived from its charter—the act of consolidation—under and by virtue of which alone it began to be and is. * * * The corporations comprising it have no further power to control their assets or direct their own movements. The new corporation has its stock, its stockholders, its directors, precisely as if the individuals owning stock had organized to form a corporation. * * * Its corporate life dates from the day of its organization. * * * *The assets of both corporations have become commingled and united.* * * * The corporations out of which it is created cease to exist or exist only for special purposes. * * * (P. 511.) The new corporation would have only the privileges, powers, and immunities which the corporation with the least powers, privileges and immunities possessed *and which were common to them all.*"

Therefore, the Kentucky amendment, even if the New Albany became a Kentucky corporation and as such passed into the consolidation, and the Indiana laws and act of 1883, remained as they were, local and domestic acts.

117 Ind., *supra.*
Shields v. *Ohio*, 35 U. S., 319.
Railway Co. v. *Georgia*, 98 U. S., 359.
Clear Water v. *Meredith*, 1 Wall., 25, 117, Ind., *supra.*

The Court of appeals held, that notwithstanding the Kentucky New Albany and the Illinois and Indiana New Albany were two different corporations, the signature of the last to the guaranty was the signature of both and made the two corporations and their properties in the three States liable, and by express order directed that

appellee, as such consolidated company of Indiana and Illinois, should be released from the guaranty on forty-five of the bonds and that such guaranty should only be held binding against the Kentucky New Albany, and thus by judicial action made another and different contract between the parties than that originally entered into.

In *Railway Co.* v. *Berry*, 113 U. S., 465, this court held that a consolidation upon like terms and conditions adopted for the creation of appellee made a new corporation, with an existence dating from the date when the consolidation took effect, and therefore privileges conferred upon one of the constituents by statute did not pass to such new company.

> If a statutory privilege granted to one of the constituents could not pass to the new company, then a special power granted to such constituent could not.

IV.

THE INDIANA ACT OF 1883, IS EXPRESSLY LIMITED TO SPECIAL CLASSES—EXCLUDING ALL OTHERS.

That act not only created a special power, but specially limited its exercise by the stockholders to special classes in Indiana and in adjoining states:

> 1st. To Indiana companies whose lines extended across the State. *All* others were excluded from the exercise of this special power.
>
> 2d. Bonds for guaranty were limited to the bonds of roads in adjoining State that would in their construction and operation benefit an Indiana road extending across the State.

All bonds of all other roads in adjoining States were EXCLUDED from this statute for guaranty, which exclusion constitutes an express prohibition.

If this act merely required the assent of the stockholders to the contract of guaranty, a different question might arise. It does much more.

It vests exclusive power in the stockholders to *try* and *determine* the vital question, *namely*: whether the Beattyville bonds belonged to the class subject to the guaranty as provided in the act.

Until the Beattyville bonds were brought within this statute by such action by the stockholders, the directors had *no* more statutory authority to direct their guaranty than if such statute had *never been passed.*

This record contains the express judgment of the stockholders, by their repudiation of this contract and guaranty at their first opportunity, that the Beattyville road in its operation would *not* benefit or aid the business or traffic of their company, and therefore the Beattyville bonds were not within the Indiana statute for guaranty.

Every case cited in the opinion of the Court of Appeals in support of this guaranty in favor of alleged *bona fide* purchasers, have been repeatedly distinguished by this court *from the one at bar* upon three grounds:

> *First*, they arose under general powers conferred upon the corporation without restriction, and without limitation as to class or subject.
>
> *Second*, general powers were expressly vested in the directors for exercise.
>
> *Third*, in the exercise of such general powers the directors were authorized, either expressly or by implication, to issue negotiable paper to aid in the conduct of the business of the corporate maker, or they contained recitals of due performance of the law sufficient to create and feed an estoppel.

In *Dixon Co.* v. *Field*, 111 U. S., 83, held:

> "And the estoppel does not arise *except* upon matters of fact which the corporate officers had authority by law to determine and to certify."

Here, were neither recitals in the guaranty nor "authority by law" in the directors or executive officers to determine the vital statutory question which was committed by the legislature to the exclusive judgment of the stockholders.

V.

The court of appeals held that the grant of this exclusive power to the stockholders which was equivalent to an express provision against its exercise by the directors, was a mere internal regulation, therefore equivalent to a by-law or secret resolution.

> "The division of the powers of the corporation may, of course, be varied by the legislature which can, if it please, give more authority to the stockholders and less to the directors, and the constating instrument must therefore in all cases be examined."
>
> *United States* v. *Dandridge*, 12 Wheat., 113.

Must be examined by whom? Naturally and esentially by all persons dealing with the corporate agents. Bear in mind we are dealing with state grants of power and legislative authority and not with the internal regulations of corporations.

In *Beveridge* v. *Railway Company*, 112 N. Y., p. 1, held

> "By-laws constitute regulations between the members, but the requirement in the legislation containing the grant of general or special power is a part of the grant, the contract between the state and the

corporation. * * * As agents of the corporation we must find the extent of their (directors') powers by an examination of the laws under which it was created and exists. Those laws in defining the power of the corporation define the scope of the directors' powers to act for it."

Ins. Co. v. *Rudell*, 103 U. S., 337.

See *Elevated Ry. Co.* v. *Elevated Ry. Co.*, 11 Daly, 373; expressly approved in *Beveridge* v. *Ry. Co., supra.*

Bank v. *Dandridge*, 12 Wheat., 78.

Twin Lick Oil Co. v. *Marbury*, 91 U. S., 587.

The Indiana act of 1883 expressly defines and limits the authority of the directors and makes it wholly dependent for existence and exercise upon the petition of the stockholders.

The word directors does not appear in the Kentucky act of 1880.

Even if the Kentucky act of 1882 applied, it expressly and directly vested corporate power in the company by its corporate name and *not* in the directors to guarantee, to consolidate or to lease.

McShane v. *Carter*, 80 Cal., 312, involved a statute which made the authority of the directors to act dependent upon the action of the stockholders; the court held:

"*We think the provision of said act* GOES TO THE POWER OR AUTHORITY *of the directors.*"

If the Kentucky act adopted as a part of its alleged incorporation of appellee's Indiana constituent the board of such constituent to represent and exercise this Kentucky corporate authority, then such Indiana directors must be controlled by Indiana and not by Kentucky law, which

would require the petition of the stockholders before special power to guarantee could be exercised.

The public—the purchasers of Beattyville bonds—were bound to take notice of this legislative grant of special power and could indulge no presumptions as substitutes for authority in the directors as special agents to "direct" the execution of the guaranty.

Davis v. *Railway Company*, 131 Mass., 258.

Spence v. *Railway Co.*, 79 Ala., 585.

Dudley v. *Whittier*, 46 Ala., 664.

In *Stillman* v. *Railway Company*, 27 Grat., 119, held:

"If they had not such notice it was their own fault."

Pierce v. *Ry. Co.*, *supra*.

In *Ernest* v. *Nichols*, 6 H. L. Cases, p. 418, Lord WENSLEYDALE said:

> "But if they do not choose to acquaint themselves with the power of the directors it is their own fault," etc.

VI.

BENEFITS DO NOT CREATE CORPORATE POWERS.

Otherwise the existence of corporate powers would depend alone upon the judgment of the board as to what it might deem incidental or directly beneficial to the corporation.

The court of appeals held that the consideration for the guaranty here at issue was for the benefit that might come to the traffic and business of appellee as grantor, and thus fell within its general powers.

The contrary was expressly held in *Davis* v. *Old Colony Ry. Co.*, 131 Mass., 258, and numerous cases therein cited, and in *Pierce* v. *Railway Co.*, 21 How., 414, in which the court cited *Coleman* v. *Eastern Counties Ry. Co.*, 10 Bevan, 1, and quoted and approved the language of Lord LANGDALE:

> "But it has been contended that they have a right to pledge without limit the funds of the company for the encouragement of other transactions however various and extensive, provided that the object of that liability is to increase the traffic upon the railway, and thereby to increase the profit to the shareholders. There is, however, no authority for anything of the kind."

But here, as shown, the stockholders vested with the exclusive legislative authority to determine that question decided that the construction and operation of the Beattyville road would not benefit the traffic of their company, and thereon promptly repudiated the action of the directors in directing the executive officers to execute the contract and guaranty, and we respectfully insist that the judgment of the stockholders cannot be reversed by the court.

VII.

The general and implied corporate powers of appellee as a consolidated corporation were limited by the articles of consolidation and laws of its creation to the ownership and operation of railroads *wholly* within the States of Indiana and Illinois.

That both general and implied powers are restricted in their exercise to the corporate purposes expressed in the articles or charter, see

Thomas v. *Railway Co.*, 101 U. S., 82.

Oregon Ry. Co. v. *Oregon Ry. Co.*, 130 U. S., 1.

Ins. Co. v. *Rundell*, 103 U. S., 336.

Pierce v. *Railway Co.*, 21 How., 414.

Ernest v. *Nichols*, 6 House Lord cases, 418.

Balfour v. *Ernest*, 94 Eng. C. L., 600.

Ridley v. *P. G. & B. Co.*, 2 Exch., 711.

Railway Co. v. *Bowser*, 48 Pa. St., 29.

People ex rel., etc., v. *Chicago Trust Co.*, 130 Ill., 268.

Davis v. *Old Colony Ry. Co.*, 131 Mass., 258,

and numerous cases therein cited.

The enumeration of these corporate purposes in these articles of consolidation excluded all implied power not necessary to effectuate them.

See cases *supra*.

VIII.

APPELLEE HAD NO GENERAL POWER TO LEND ITS CREDIT OR GUARANTEE THE DEBTS OF ANY OTHER ENTERPRISE OR COMPANY.

> "*It is no part of the ordinary business of corporations* and *a fortiori*, still less so of non-commercial corporations to become surety for others. Under ordinary circumstances, without positive authority in this behalf in the grant of corporate power, all engagements of this description are *ultra vires*, *whether* in the indirect form of going on accommodation bills or otherwise becoming liable for the debts of others."
>
> *Lucas, Cashier, etc.*, v. *White Line Transfer Co.*, 70 Iowa, 549.

See

Morawitz, Section 537.

Davis v. *Old Colony Ry. Co.*, *supra*, and cases cited in opinion.

Coleman v. *Ry. Co.*, 10 Beav., 1.

Ry. Co. v. *Ry. Co.*, 11 C. B., 775.

Pearce v. *Ry. Co.*, 21 How., 443.

IX.

All courts agree that it requires special legislative power to authorize the purchase of the stock or to guaranty the debt of any *other* company or enterprise, and when granted the same remains a special power and does not become one of the general powers of the company to acquire and operate the railroad mentioned in its charter or articles of incorporation.

In *Franklin County* v. *Bank*, 68 Me., 45, held:

> "In the United States corporations *cannot* purchase or hold or deal in the stock of *other* corporations *unless* expressly authorized to do so by law. Green Brice *Ultra Vires*, 95, and note citing a number of authorities. * * * If a corporation can purchase any portion of the capital stock of another corporation, it can purchase the whole, and invest all of its funds in that way, and thus be enabled to engage exclusively in a business entirely foreign to the purposes for which it was created. * * * *This the law will not allow.*"

This precise question was involved in *People* v. *Chicago Gas and Trust Company*, 130 Ill., 268.

To the same effect see:

Sumner v. *Marcy*, 3 W. & M., 105.

Ry. Co. v. *Pierce*, 21 How., *supra*.

Bank v. *Agency Co.*, 24 Conn. Rep., 159.

Starin v. *Town of Genoa*, 23 N. Y., 439.

X.

THIS CASE INVOLVES THE LAW OF AGENCY AS WELL AS QUESTIONS OF CORPORATE POWER

An agent exercising general powers within the limits of expressed or implied corporate powers, might be deemed and taken as the general agent of the company, and as such authorized to transact its *ordinary* business in the *usual* manner, *but* in the exercise of any *special* authority affecting any subject outside of these express corporate powers he must be deemed and taken as a *special* agent, and those dealing with him must take notice that his authority as such *special* agent is not *general* but limited, and *no presumption* will be substituted for actually absent special authority.

Starin v. *Town of Genoa*, 23 N. Y., 439.
Balfour v. *Ernest et al.*, 94 Eng. C. L., 600.
Pratt v. *Short*, 79 N. Y., 437.
Ry. Co. v. *Iron Co.*, 44 Ohio St., 44.
Hackensack Water Co. v. *DeKay*, 46 N. J. Eq., 548.
Martin v. *Mfg. Co.*, 9 N. H., 71.
Morawetz, Secs., 602, 604.
LeMoyne v. *Bank*, 3 Dill., 44.
Spence v. *Ry. Co.*, 79 Ala., 585.
Ernest v. *Nichols*, 6 House of Lords, 418.
Chambers v. *Railway Co.*, 5 B. & S., 17.

First. A collateral guaranty is *unusual*, and therefore presumably *unauthorized*. The purchaser therefore is bound to take notice that general corporate agents ordinarily have no power by virtue of their offices as such,

to fasten such liability upon the corporation and no presumptions will protect such guaranty.

The general rule is stated in *Marsh* v. *Fulton Co.*, 10 Wall., 683.

> "The authority to contract must exist before any protection as an innocent purchaser can be claimed by the holder. This is the law even as respects commercial paper alleged to have been issued under a delegated authority, etc."

In *Bank* v. *Bergen*, 115 U. S., 391, held:

> "The delegation must be first established before the doctrine can come in for consideration."

Second. It would seem well settled that a mere presumption can not create an agent and constitute authority to him to bind the principal without the latter's knowledge or consent. Neither persons, corporations or stockholders can be made principals without their knowledge or act.

Here were neither recitals nor representations of action by the board or by the stockholders. The bonds were bought from the Contract Company, and it received the consideration therefor. Defendants do not claim in their answers that they had any knowledge of the resolution of the board, and under the decision of the Court of Appeals none was needed.

The latest utterance of the Supreme Court on the subject is *Evansville* v. *Dennett*, 161 U. S., p. 441:

> "The city charter provided that 'no stock shall be subscribed or taken by the common council in such company unless it be on the petition of two-thirds of the residents of said city,'" etc.

The court, discussing the right of innocent purchasers, said:

> "Was a *bona fide* purchaser of bonds issued in payment of a subscription of stock—the power to

subscribe being clearly given—bound to know that the conditions precedent to the exercise of the power were not performed? If the bonds had not contained any recitals, importing a performance of such conditions before the power to subscribe was exercised, then it would have been open to the City to show, even as against a *bona fide* purchaser that the bonds were issued in disregard of the statute, and therefore did not impose any legal obligation upon it. *Buchanan* v. *Litchfield*, 102 U. S., 278; *School District* v. *Stone*, 106 U. S., 183, 187."

Bank v. *Turquand*, 6 E. & B., 38 (decided May 1, 1856), relied upon with repeated emphasis by counsel for appellant and by the court of appeals in its opinion has *no* application to this case.

In that case the registered deed of settlement of the company and *not the act* of Parliament under which it was incorporated, required the resolution by the shareholders to authorize the execution of the bonds. The company pleaded that without resolution by the shareholders the directors were without authority to direct the execution of the bonds. The plaintiff by replication exhibited a resolution passed by the stockholders authorizing the bonds to be given. The defendant denied the sufficiency of the resolution. The validity of the bond sued on depended upon that issue. The court upon the inspection of the resolution held it was at least sufficient to evidence the action and consent of the shareholders, which entitled plaintiff to judgment. All said by the court thereafter touching presumptions that might arise in the absence of such resolution was unnecessary to the decision of the case. But this was *not* a guaranty of the debt of *another* corporation. It was given in the *usual* course of business. It fell within the general powers. The company received the money, and was therefore

estopped by the resolution, as well as by the receipt of the consideration. *That case differs from the one at bar upon every material point.*

In *Chambers* v. *Ry. Co.*, 5 B. & S., 117 E. C. L. Rep., 586, *decided* in the Exchequer Chamber eight years *after Bank* v. *Turquand*, the railway company was authorized to borrow money on certain express conditions. One was that no money for corporate purposes should be borrowed until the whole of the capital of 550,000 pounds should have been subscribed for, etc. In the decision of that case BLACKBURN, J., quoted and approved *Cruteis* v. *Anchor Ins. Co.*, 2 H. & N., 537, which was an action on an annuity deed executed by three directors of the joint stock company, and in that case

> "the court allowed the defendants to plead that the directors making the deed had no power to bind the company, *because* they had no authority to affix the seal to such deed *without* being submitted to a general or special meeting of the shareholders in pursuance of statutes 7 and 8 Vic., Chap. 110."
>
> "* * * and when I look at the whole scheme of stat. 7 and 8 Vic., chapter 85, etc., especially section 19, together with section 38, etc., which prescribes the mode in which the money is to be raised for the purpose of the undertaking, I come to the conclusion that it appears clearly by reasonable or necessary inference that the legislature have restrained the power of a company to borrow money on mortgage or bonds, *except in the way authorized by the special act.*"

Thus that court did *not* apply the *obiter dicta* in *Bank* v. *Turquand.*

In *Balfour* v. *Ernest et al.*, 94 Eng. Com. Law, 600, decided *after Royal British Bank* v. *Turquand*, the court held that under the broad powers vested in the directors their authority was limited to matters

> "in furtherance of the ordinary business of the society," etc., and "*not* in satisfaction of the liabilities of any other company."

The draft involved in that suit was drawn under the authority of the directors in performance of a contract for the amalgamation of two companies. The court held the contract void and said:

> "It is clear, therefore, that this bill was drawn without authority. If that were not so, this consequence would follow, that, although the amalgamation with the other company was illegal and void, *because* THE GENERAL BODY DID NOT ASSENT TO IT, yet the directors, having amalgamated the two companies without authority, might still do all that was necessary to carry out such amalgamation; which would be manifestly absurd."

AGAIN CLEARLY OVERRULING, BY NOT FOLLOWING, *Bank* v. *Turquand*.

Third. THE PUBLIC IS REQUIRED TO TAKE NOTICE OF THE DIFFERENCE BETWEEN GENERAL AND SPECIAL AGENTS AND THEIR AUTHORITY.

Ins. Co. v. *Rundell*, 103 U. S., 337.

In *Davis* v. *Railway Company*, 131 Mass., *supra*, held:

> "That the public is bound to take notice of the legal limitations of corporate capacity with the legal distinction between *ordinary* and *extraordinary* powers and of all limitations and restrictions upon the latter."

In *Stillman* v. *Railway Company*, 27 Grat., 119, touching special powers of corporate agents, and notice thereof, the court said (p. 130):

> "The court is, therefore, of opinion that appellants are not innocent purchasers for value and holders of said bonds without notice of the pro-

> visions of the act of assembly by which the said company derived their authority to execute a mortgage to secure their payment, etc. *If they had not such notice it was their own fault.* Persons dealing with corporations must take notice of whatever is contained in the law of their organization, and they must be presumed to be informed as to the restrictions and conditions annexed to the grant of power by the law by which the corporation is authorized to act."

"That directors of the corporation are its agents and executive officers"—that the directors do not constitute the corporation, see opinion Judge Van Brunt, 11 Daily, 2 N. Y. Com. Pleas, 437, EXPRESSLY APPROVED in *Beveridge* v. *Railway Company*, 112 N. Y., 1; *Bank* v. *Dandridge*, 12 Wheat., 78, and *Twin Lick Oil Co.* v. *Marbury*, 91 U. S., 587.

Against these decisions and in support of its holding, the Court of Appeals cites *Hoyt* v. *Thompson Exrs.*, 19 N. Y., 216, which was not followed in *Beveridge* v. *Ry.*, *supra*.

Judge VAN BRUNT, speaking of *Hoyt* v. *Thompson*, in *Elevated Ry. Co.* v. *Elevated Ry. Co.*, *supra*, 11 Daly, 373, said that it, p. 476,

> "is also claimed to be an authority against the suggestion made above but upon examination it will be seen that much is said in respect to the relation of directors to their corporation, and the rights and powers and the sources from which they are derived, which was *not at all* necessary to the decision of the question involved," etc.

Judge Van Brunt then quoted from *Hoyt* v. *Thompson*, the language recited by the Court of Appeals, and said:

> "The whole of this argument was devoted to establishing the power of the board of directors to

delegate the authority to manage the ordinary business of the corporation to five of their number, and had no other purpose."

The directors as such corporate agents may exercise a power directly vested in them by the legislature, *without* the intervention of the stockholders, but not so if the power for exercise is directly vested in the corporation or stockholders by special designation.

In *McShane* v. *Carter*, 80 Cal., *supra*, held:

"Nor can the consent of the stockholders be presumed from the mere fact of the conveyance, whether under corporate seal or not," etc.

In *Ireland* v. *Turnpike Co.*, 19 Ohio St., 363, held:

"We cannot presume his assent to these proceedings or his acquiescence in them from the mere fact that they took place."

Mechanic's Bank v. *Ry. Co.*, 13 N. Y., 640.

The public—the defendant purchasers of the Beattyville bonds—were bound to take notice of this legislative grant or special power and could indulge no presumptions for authority in the directors as special agents to "direct" the execution of the guaranties here involved.

In *Spence* v. *Ry. Co.*, 79 Ala., p. 585, held:

"All persons dealing, etc., * * * being bound to inform themselves of the extent of the corporate powers, they must needs examine the act of incorporation which confers the power. *Like* the investigator of a land title they must examine *all the links* in the chain and are charged with knowledge of any fact such examination would disclose."

In *Pearce* v. *Railway Company*, 21 How., *supra*, Mr. Justice CAMPBELL said:

"Now, persons dealing with the managers of a cor-

poration must take notice of the limitations imposed upon their authority by the act of incorporation."

The court then cites, quotes and approves *McCreggor* v. *Official Manager of the D. & D. Ry. Co.*, 16 L. Eq., 180.

Coleman v. *Eastern Counties Ry. Co.*, 10 Bevan, 1.

To the same effect see *Dudley* v. *Whittier*, 46 Ala., 664.

It would seem from the decision of the Court of Appeals that *although* the guaranty does not appear to have been made by or on behalf of the alleged Kentucky New Albany, the purchaser had the right to presume it was executed under the Kentucky amendment; that *although* it does not appear to have been executed by the Indiana New Albany, the purchaser had the right to presume that it was executed under the Indiana domestic act of 1883, and that these presumptions arise *notwithstanding* purchasers were bound to know that the only existing and acting New Albany corporation was the New Albany created by the consolidation of Indiana and Illinois companies, which acted alone and exclusively through Indiana and Illinois stock, stockholders, directors and officers, under Indiana and Illinois law.

Fourth. AGENCY—ESTOPPEL AND THE LEGAL EFFECT OF THE GUARANTY AND THE SCOPE OF THE NOTICE IMPOSED UPON BOND PURCHASERS FURTHER CONSIDERED.

If purchasers may from the manual execution of a guaranty without recitals presume that statutory conditions precedent to an authorized execution had been performed

—that the stockholders had specially authorized the directors to direct such guaranty then NO limitation, restriction or qualification the legislature might prescribe could avail.

If this doctrine is sound the result is so startling that some change in the law should be wrought without delay. Judge BARR declared in his opinio n that if this were true

> "stockholders could not be protected by any limitations or conditions placed upon corporate power and that the sovereign grantor could neither prescribe or restrict the agencies either general or special for its exercise," etc.

This terse statement of the necessity for the rule applied by Judge Barr and its enforcement, find abundant support in the adjudicated cases, and nowhere more closely stated than by Mr. Justice GRAY, in *Beveridge* v. *Ry. Co., supra:*

> "If it is deemed to be too extensive a power to be vested in the directors and dangerous to the rights of the stockholders in possibility of fraud, it is for the legislature to interfere and prescribe regulations for its exercise."

The legislature did deem it "too extensive a power to be vested in the directors," and did regard its exercise by the directors as "dangerous to the rights of the stockholders in the possibility of fraud," and therefore "the legislature" did "interfere and prescribe regulations," etc.

If purchasers may presume upon the mere *manual* execution of the guaranty by the executive officers that the stockholders acted when they did not act, then they may equally presume that the directors acted when they did not act, and with equal logic and justice they might in-

dulge the same presumption, although both stockholders and directors had forbidden the execution of the guaranty by such executive officers.

The Court of Appeals fully recognized this principle in holding that the guaranty was endorsed on the bonds *without authority* and was therefore void as to all who had knowledge which eliminates from this case the possible presence of real or actual authority in the directors to direct, or in the executive officers to execute the guaranty.

But the Court of Appeals further held that persons without actual knowledge might presume that the special authority requisite to a valid guaranty was present, from which it conclusively follows that *without* such presumption the guaranty is equally void in the hands of any party.

Where the supposed agent has *no* authority the principal is not bound, because the supposed agency did not exist. To bind the principal therefore, he must have acted, and the action by which he is usually bound in the *absence* of *actual* authority is in clothing in some manner the agent with *apparent* authority, and therefore misleading an innocent purchaser into dealing with him upon the rightful presumption of such authority.

In such case the principal is bound, *not* by virtue of the agent's authority, *but* because the principal so acted as to preclude him from declaring the truth, *namely*, that the agent had no authority in fact.

This is the doctrine of estoppel—*agency by estoppel.*

The Court of Appeals, finding no act of estoppel by the stockholders either in pleadings or proof, substituted the Indiana act of 1883 and predicates the estoppel

thereon by making it, *and not any act of the stockholders*, the basis for the presumption upon which purchasers might depend for validity of the guaranty.

By this act the legislature made the stockholders principals, and authorized them by petition to appoint the directors their agents, with authority from them to "direct" (not to authorize) the execution of the guaranty. Without any act or knowledge by the stockholders, and therefore, without any statutory authority whatever, the directors assumed to authorize the execution of the guaranty, and thereon the Court of Appeals in effect held:

(1.) That this unauthorized act by the directors constituted apparent authority from their principals, the stockholders.

(2.) That the mere manual signing of the guaranty by the executive officers justified defendants in indulging a presumption resting upon the total absence of any act or knowledge of the stockholders.

In *Mercer Co.* v. *Ins. Co.*, 72 Fed., 623, Judge LURTON cites, and quotes and applies, *Loan Association* v. *Perry Co.*, 156 U. S., 701:

> "Undoubtedly the commercial value of such bonds would be much improved if the mere fact of their issuance should in favor of innocent holders be conclusive evidence of both the authority to issue them and the regularity of the exercise of that power. *This, however, is not the law.*"

(3.) The Court of Appeals in effect further held, that this presumption is not only a sufficient substitute for express authority from the stockholders, but that such presumption, which no act of the stockholders tended to create, estops them from repudiating the attempted guaranty when it first came to their knowledge.

Thus the principal is made liable without his knowledge, and is manacled by an estoppel no act of his tended to create.

These principles and authorities cannot be avoided by the suggestion that the case as here put would constitute forgery, *because* the person acting does not personate the principal, but merely assumes to act as his agent, and in the total absence of authority the assumed agent may be held by the person with whom he deals as principal in the transaction.

In *Bank* v. *Railway Company*, 3 Kernan, 634, Judge COMSTOCK, in discussing this identical question, said (page 634):

> "The fundamental proposition, I repeat, is, that one man can be bound only by the authorized acts of another. He cannot be charged because another holds a commission from him and falsely asserts that his acts are within it. * * * But suppose the power to give the note is on its face conditional. It then has no existence until the condition had been fulfilled. To a confiding dealer who believes that the agent would not do an improper act, the note will certainly carry the appearance of due authority, but if it turns out that the conditions had not occurred on which the exercise of the power depended, then he has trusted to the representation of the agent and I think must look to him alone."

As held by Judge Comstock, "this special power had no existence until the condition had been fulfilled"—*until* the stockholders had by their action brought the Beattyville bonds within the statute for guaranty.

Judge COMSTOCK further said:

> "As the principal never authorized the transaction at all, he is bound neither by the contract nor by the representation. If not by the former, then it is extremely plain he is not by the latter. * *

> * But the dealing itself must be authorized. * * * If the fraud consists in an over representation of his power to act by which others are drawn into dealing with him, then it is a self-evident proposition that a man can no more enlarge than he can create a power by such a representation."

If the agent cannot enlarge or create a power, how can the power be presumed, or how can the exercise of the power by the principal requisite to create the agency be presumed?

Judge COMSTOCK further held:

> "The precise difficulty is that they relied upon the appearance which the agent gave to the act, and by that they were deceived. They were under no deception as to the power in its real or apparent scope. Testing the question by any rule of agency with which I am acquainted the defendant was not bound by the transaction."
>
> *Bank* v. *Aymar*, 3 Hill, 262.

So here, the defendants had the right, and it was their duty to see that the directors were acting upon the petition of the stockholders, which constituted the basis and the essential statutory foundation for their authority, and failing to do so, they have no ground for complaint.

In *Mercer Co.* v. *Ins. Co.*, 72 Fed. 623, Judge LURTON cites, quotes and applies *Loan Association* v. *Perry Co.*, 156 U. S., 701:

> "Every one dealing with an agent assumes all the risk of lack of authority in the agent to do what he does. Negotiable paper is no more protected against this inquiry than any other."

All the stockholders have done was to become incorporated, and elect directors under the laws of its incorporation.

Does the court mean to force upon stockholders the dilemma to either forbear to take advantage of Indiana law permitting incorporation, or by the mere act of incorporation and election of directors clothe them with an unlimited power of attorney to ignore all laws regulating or restricting their acts notwithstanding the legislature expressly vests the special corporate power it grants in the stockholders for exercise, and makes the petition of the stockholders the sole authority to the directors upon which they may direct the guaranty. If so, then stockholders by merely electing directors clothe them with an apparent authority to disregard the law under which their election occurs. Then how can this court hold that the provision of the Indiana statute requiring the action of stockholders is for their protection?

In *Ernest* v. *Nichols*, *supra*, Lord WENSLEYDALE said:

> "The stipulations of the deed which restrict and regulate their authority, are obligatory on those who deal with the company, and the directors can make no contract so as to bind the whole body of the shareholders for whose protection the rules are made, unless they are strictly complied with. * * * The great body of shareholders for whose protection these limitations of authority are provided, cannot be affected, unless they are complied with."
>
> *Fountain* v. *Railway Co.*, L. R. Eq., 5, 321.
>
> *McShane* v. *Carter*, *supra*, Morawetz, Sec. 602, and cases cited and quoted, *ante*.

In *Lord* v. *Y. F. G. Co.*, 99 N. Y., 547, the court in speaking of statutory requirements for a two-thirds vote or assent of two-thirds of the stockholders, said that such a provision plainly evinced the purpose and intent to protect the stockholders from improvident or corrupt act by

the officers of the company, and that under the statute which required the assent or authority of the stockholders before mortgaging the franchises such a mortgage without such assent was void.

Beveridge v. *Ry. Co.*, *supra*.

In *Adams* v. *Trego*, 35 Mo., p. 66, the question was whether the act by a corporate agent was binding upon the corporate principal. In speaking of the powers conferred and the presumptions contended for by counsel the court held:

> "If powers like the present were construed as contended for by the appellee there would be no safety for principals."

It is because the power is special and the purpose unusual that a special grant and delegation of it for exercise was necessary.

XI.

The Court of Appeals in holding that the doctrine of agency is involved, said (p. 26):

> "It is to be inferred, therefore, when the principal gives to an agent authority to put in circulation negotiable paper in a certain class of cases, he knows he has given his agent an appearance of authority, etc."

We admit that where a corporation is authorized by its charter, either expressly or by implication, to issue promissory notes for money borrowed or for material to be used in and about the conduct of its corporate business, and the corporation authorizes the proper officers to execute and put out such paper for such uses, and such officers issue the promissory negotiable notes of the company for the accomodation of another, such accommo-

dation notes could pass into the hands of a third party for value with the appearance of having been executed under the real authority for corporate purposes. *But such a case is not before the court.*

Suppose the New Albany Company had issued its negotiable paper instead of this guaranty, on the face of which appeared the words,

> "This note is made for the accommodation of the Beattyville Company and to meet one of its obligations,"

and defendants had purchased the same, would this court hold that they were innocent purchasers for value without notice?

In equally plain words, the guaranty proclaims its execution for the bonded debt of the Beattyville Company.

Bank v. *Bank*, 95 U. S., 557, involved a guaranty endorsed upon a note or draft. Mr. Chief Justice WAITE said:

> "The very form of the paper itself carried notice to the purchaser of the possibly want of power to make the endorsement and is sufficient to put him on guard."

In *Lemoine* v. *Bank*, 3 Dill., 44, Judge DILLON held:

> "* * * 'For suretyship' it has been well remarked 'is a contract which carries with it a lesion by its very nature.' (*Louisiana, etc., Bank* v. *Nav. Co.*, 3 La. Ann., 294.) Therefore, when a bank has knowledge that an endorsement of the name of a firm is an accommodation endorsement, it is bound at its peril to ascertain whether all the members of the firm on whom it intends to rely assented to this use of its name. This it can easily do."

Hendrie v. *Berkowitz*, 37 Cal., 113.

Savings Bank v. *Parmlee*, 3 Dill., 403.

In McLellan against Detroit File Works, 56 Mich., 579, the president executed notes of the company to take up notes of indebtedness not its own. In speaking of the plaintiff the court (p. 583) cited *West St. Louis Savings Bank* v. *Shawnee County Bank*, 95 U. S., 557. *Perry* v. *Simpson, etc., Co.*, 37 Conn., 520, and held:

> "The general authority to make commercial paper in the name of a corporation is given to be exercised for the benefit and in the business of the corporation, and not for the benefit or in the business of others."

So here, nothing can be implied because the fact of the guaranty itself raised a manifest presumption that it was not made "in the regular course of business" of the guarantor, and was therefore "presumptively *ultra vires*."

The public dealing with Beattyville bonds on which appeared the guaranty was in law bound to take notice:

First. That appellee was created by consolidation and expressly limited to the corporate enterprise and business defined and restricted by its articles of consolidation.

Second. That these articles were limited to Indiana and Illinois constituents, to which no Kentucky corporation was a party, and that the contract between the holders of consolidated stock, with the consolidated company and with the states of Indiana and Illinois was limited and controlled by these articles.

Third. That the consolidation extinguished the constituent companies, and therefore at the date of the Kentucky amendment of 1882, the Indiana incorporator mentioned in the Kentucky act of 1880 had ceased to exist.

Fourth. That neither the legislature of Illinois or

Indiana had power by amendatory legislation to extend such contract to new business without the assent of all the stockholders, parties to such contract.

Fifth. If the Indiana act of 1883 extended to and included appellee as an Indiana and Illinois corporation, then proposed purchasers were bound to know the conditions and requirements of that act, *namely*, that it conferred no power upon the directors to direct the guaranty; that the authority of the directors depended exclusively upon the petition of these stockholders, *without* which the directors were not agents under this Indiana act, and were *without* any apparent authority whatever to exercise such *special* power.

As SHOWN the bond market was not only bound to know these things, but was impressed with knowledge and notice of the law as declared by the courts of this country, touching the rightful construction to be given to corporations so created and limitations and restrictions placed upon special statutory authority and special agents.

In *Lowell* v. *Inhabitants*, 8 Allen, 109, in speaking of the duty of a party dealing with a corporation to inquire as to the power of the agent, etc., the court said:

> "The liability of the principal certainly cannot be made to turn on the ease or difficulty with which the continuance or termination of the authority can be ascertained. Such a doctrine would create a new head in the law of agency. * * * Whoever deals with the agent must at his peril ascertain whether the agent has any authority in fact, and if he has, whether the act or deal is within its scope. If this can be ascertained there will be no risk incurred; if it can *not* be ascertained the *sure* protection will be to refrain from dealing with the agent at all."

Morawetz states the rule at section 606:

> "A party dealing with an agent is not entitled to assume the existence of any extraordinary state of facts in order to bring the acts of the agent within the scope of his apparent authority. Hence, if an act performed by an agent of a corporation would be in excess of the company's charter or the agent's authority, *except* under extraordinary circumstances, the company can be held bound by such act *only provided those extraordinary circumstances did exist.*"

In *Hackensack Water Co.* v. *DeKay*, 36 N. J. Eq., 548, held:

> "If the power granted by the charter is subject to a condition, relating either to the form in which the security shall be made in order to be valid, or to some preliminary proceeding extraneous to the acts of the corporation or its officers, securities issued not in the prescribed form, or without the preliminary proceedings had, are subject to defenses in consequence thereof, even in the hands of *bona fide* holders."

The difficulty in this case has arisen from a confusion of *general* and *special* powers and *general* and *special* agents, and upon the theory that *general authority* to exercise general powers constituted an *apparent authority* to exercise special powers touching transactions *outside* of the usual or ordinary corporate business.

XII.

EFFECT OF REPUDIATION.

The legislature having vested in the body of the stockholders the power, judicial in its nature, to decide as to what bonds are guarantiable under the statute, their decision is conclusive, and will not be reviewed by the courts.

Ry. Co. v. *Supervisors*, 48 N. Y., 93.
Ballinger v. *Gray*, 51 N. Y., 610.
Mayor v. *Davenport*, 92 N. Y., 604.

Defendants' equities as alleged *bona fide* purchasers could not determine or cut off the statutory power, authority and right vested in and conferred upon the stockholders to determine against the world the question as to whether the Beattyville road was within the statute for the guaranty of its bonds, and the repudiation by the stockholders constituted such determination.

The Court of Appeals states (Opinion p. 16) as an elementary principle that

> "if the power to mortgage the entire assets of a company, etc., does not involve such an organic change in the corporation as to require the assent of the stockholders, it seems manifest that no such change arises from an exercise of the power conferred by statute on a corporation to guarantee the bonds of a connecting company to secure favorable business relations with it."

We had supposed it well settled that the general power of a corporation to mortgage is co-extensive with its power to acquire property, and that such mortgage is given in and about its corporate business, upon its own property, for its own debt, to be used in the conduct of

its exclusive corporate affairs. But how is the court to know that the Beattyville road in its operation would aid the business of the New Albany? *Under* this statute which creates the stockholders the sole tribunal to determine that question, can it be presumed without such action, or can the court determine it from any evidence in the record, or from any that might have been introduced in the absence of its decision by the stockholders themselves? *But* this record contains the express judgment of the stockholders by their repudiation of this contract and guaranty at their first opportunity that the Beattyville road in its operation would not aid or benefit and therefore Beattyville bonds were *not within the Indiana statute for guaranty.* Its decision of the stockholders is not subject to judicial review.

XIII.

BRIEF REVIEW OF SOME OF THE CASES CITED BY THE COURT OF APPEALS.

Every case cited in the opinion of the Court of Appeals, in support of this guaranty or in finding a remedy thereon for the alleged *bona fide* purchasers, can be easily distinguished from the one at bar upon three grounds.

1st. They arose under general powers conferred upon the corporation without restriction and without limitation as to class or subject.

2d. Such express power was expressly vested in the directors for exercise.

3d. In the exercise of such general powers the directors were authorized either expressly or by implication to issue negotiable paper to aid in the conduct of the

business of the corporate maker, *or* they contained recitals of due performance of the law sufficient to create and feed an estoppel.

Zabriskie v. *Railway Company*, 23 How., 400, does not support the opinion of the Court of Appeals. In that case the guaranty was expressly authorized by statute, which empowered the company

> "at any time by means of their subscription to the capital stock of any other company, *or otherwise*, to aid such company in the construction of its railroad for the purpose of forming a connection of said last mentioned road with the road owned by the company furnishing such aid."

Then follows a provision requiring authority by two-thirds vote of the stockholders of each company to make any arrangement authorized by this statute. A stockholders' meeting was held.

The court said, page 401:

> "The proxy of the appellant was there, exhibited his instructions, discussed the proposition submitted and declined to vote, when his vote would have controlled the action of the meeting. Since that time several annual meetings have been held at which appellant was represented. * * * These negotiable securities have been placed on sale in the community, accompanied by these resolutions and votes, inviting public confidence. They have circulated without an effort on the part of the corporation or corporators to restrain them, or to disabuse those who were influenced by these apparently official acts."

No action by the stockholders or grounds for estoppel upon which the court sustained the guaranty in *that* case are shown *here*.

The court cites *Beecher* v. *Railway Co.*, 45 Mich.,

103. In that case the stockholders' meeting had been held. It was urged it had not been duly called. The court held it was sufficient. Judge COOLEY said:

> "The mortgage was never repudiated by the stockholders and they do not now complain of it. What would have been the result if no corporate meeting had been held, we do not decide."

The court cites *Bair* v. *Railway Company*, 25 Fed., 684, and quotes from Justice Brewer's opinion, that the public was not bound to examine the private books of the corporation. Why? Because it involved title to land. "There," said Mr. Justice BREWER:

> "you look to the record title he has, and if it is good you can deal with him on the faith of that in safety, and you are not chargeable with notice of any undisclosed equity."

Neither question of corporate power or agency was involved.

The court cites *Koehler* v. *Iron Co.*, 2 Black, 715, in support of the proposition that the execution of the guaranty imported authority, but Mr. Justice DAVIS in *that* case said:

> "The mere fact that the deed has the corporate seal attached does not make it the act of the corporation unless the seal was placed to it by some one duly authorized," citing in the opinion numerous cases in support of the rule.

In *Thomas* v. *Horse Ry. Co.*, 104 Ill., 462, cited by the court, the stock of the company was all held and represented by the directors who took action, and it was held, that although technically there was no meeting of the stockholders all was substantially done by the stockholders which the statute required. Here nothing was done by the stockholders.

Bank v. *Globe Works*, 101 Mass., 57, cited by the court, involved an accommodation negotiable note. It was held valid against the corporate maker upon the ground that it had the general power to issue its own paper in and about its business, and an accommodation note in like form would raise the presumption that it was issued and used for corporate purposes. A guaranty would raise the *contrary* presumption.

Again this general power to execute paper was not hemmed in by express restrictions and limitations.

In *Moran* v. *Commissioners, &c.*, 2 Black, 722, Miami County issued certain bonds payable to the railroad company, or bearer. In defining the powers of this municipal corporation Mr. Justice WAYNE cited *Zabriskie* v. *Railway Company*, 23 How., 400, saying that in that case in the construction of a railroad charter held,

> "that neither privileges, powers nor authorities could pass unless they are given in unambiguous words, and that an act giving *special* privileges *must be strictly construed.*"

That is, a special power cannot be extended or added to by implication. Nothing is written into it by construction. The court then cited and quoted *Knox* v. *Aspinwall*, 21 How., 531, and reiterated what was there said, *namely*, that the recitals upon the face of the bond of full performance under the statute authorizing its issue relieved the purchasers from inquiry into further or other evidence of such compliance.

That case was then decided upon the ground of estoppel.

In *Railway Co* v. *Railway Co.*, 145 U. S., 403, the decision simply was that the stockholders might by their conduct be estopped from repudiating the unauthorized

act of the directors, in making a lease which could not be lawfully made without their consent.

The court said that the petition did not limit the scope of the powers conferred on the corporation

> "but only prescribed regulations as to the manner of exercising corporate powers, compliance with which the stockholders might waive, or the corporation might be estopped by lapse of time or otherwise to deny."

There is no question of waiver, ratification or estoppel by laches or acquiescence in this case, but prompt repudiation followed first notice of the guaranty, and here the power was never vested in the board, *but* was expressly withheld from their exercise.

A satisfactory review of all the authorities cited in the opinion would extend this argument to an inexcusable length.

Respectfully submitted.

G. W. KRETZINGER,
E. C. FIELD and
JAMES S. PIRTLE,
For Appellee.